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Supreme Court of the United States.

FRANCIS L. McDERMOTT, *Petitioner,*

v.

JOSEPH J. JAMULA ET AL., AS REPRESENTATIVE OF THE ENTIRE MEMBERSHIP OF LOCAL 284 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FREDERICK M. MYERS,
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Petitioner.

Of Counsel:
W. STANLEY COOKE,
JOHN L. HAWKINS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner prays that a writ of certiorari be issued by this Court to require the certification to it by the Superior Court for the County of Berkshire in the Commonwealth of Massachusetts of the record in the case of Francis L. McDermott against Joseph J. Jamula *et al.*, numbered 15,762 on the docket of that Court, wherein a final decree dismissing the petitioner's bill of complaint has been entered after rescript from the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported in the Massachu-

setts Advance Sheets (1958) at pages 1383-1391. A copy of the opinion is printed at the end of this petition.

Grounds on which the Jurisdiction of This Court is Sought.

The jurisdiction of this Court is sought under 28 U.S.C. § 1257, on the ground that the petitioner's constitutional rights have been infringed by the deprivation of his property rights guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States, as more specifically set forth below in the argument.

28 U.S.C. § 1257, reads as follows:

> "§ 1257. *State courts; appeal; certiorari*
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(3) By a writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The decision of the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts was rendered on December 9, 1958. Final decree of the Superior Court, after rescript, was entered on December 24, 1958.

Question Presented for Review.

The question presented for review is whether the petitioner's right to work and his right to equal protection of the law, guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States, have been infringed.

Constitutional Provisions.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Concise Statement of the Case.

This case was brought in the Superior Court by a bill in equity wherein the plaintiff (petitioner herein) sought reinstatement in Local 284 of the International Brotherhood of Electrical Workers (hereinafter referred to as Local 284) and the International Brotherhood of Electrical Workers (hereinafter referred to as the I.B.E.W.). A decree was entered in the Superior Court dismissing the bill. On appeal the Supreme Judicial Court affirmed the action of the Superior Court and issued its rescript to that effect. The Superior Court entered a final decree after rescript dismissing the bill.

The bill of complaint alleged that the petitioner had been a member in good standing of Local 284 and the I.B.E.W. from September, 1941, until his suspension on or about June 2, 1953 (R. 13, 14). As a member in good standing of Local 284 and the I.B.E.W. he was entitled to all benefits thereunder, including the right to have the business agent seek employment for the petitioner, pension rights of a substantial nature, and all of the other rights incidental to his being a member thereof. It was the duty of the business agent of Local 284 to seek employment for all members of Local 284.

Local 284 and the I.B.E.W. are both unincorporated voluntary associations acting in the capacity of labor unions. The I.B.E.W. is a national or international organization comprising many local unions, of which Local 284 is one. All local unions are governed by the constitution of the I.B.E.W., and, whenever there is any conflict between their own by-laws and the constitution of the I.B.E.W., the constitution governs.

The evidence introduced before a master disclosed that the monthly dues of Local 284 and the I.B.E.W. combined were a total of $9.10, of which $4 was sent by the financial

secretary of Local 284 to the I.B.E.W. as required by the constitution of the I.B.E.W.

The financial secretary also made financial reports to the I.B.E.W. on or about the 10th day of each month. These reports included what is called a duplicate receipt of dues (R. 14), a sample of which is contained in the master's report. All dues payable by a member to either or both Local 284 and the I.B.E.W. must be paid to the financial secretary of the I.B.E.W. These receipts set forth the member's name, date of payment, amount of payment and what period the payment covered.

The constitution of Local 284 and the I.B.E.W. provides for the payments of dues by union members as follows (art. XX, sec. 1): "Local Unions shall collect dues from members either monthly or quarterly in advance . . ."

The by-laws of Local 284 provide as follows (art. X, sec. 4): "Dues are payable monthly in advance. . . ." The constitution of Local 284 of the I.B.E.W. (art. XXIII, sec. 3) provides as follows: "Any member indebted to his Local Union for three months' dues, or having any past due indebtedness to the I.B.E.W. for dues or assessments, shall stand suspended, and the Local Union may refuse to accept dues from any member who is indebted to it. . . ."

All of the petitioner's dues and assessments from the date of his first becoming a member of Local 284 and the I.B.E.W. in September of 1941 up to March 1, 1953, had been paid in full.

On May 31, 1953, the petitioner owed his dues to Local 284 and the I.B.E.W. for the months of March, April and May, 1953. May 30, 1953, was Memorial Day and a legal holiday. May 31, 1953, was a Sunday and not a business day. On Monday, June 1, 1953, at an early hour of the morning, the petitioner went to the post office in the City of Pittsfield and purchased a money order in the sum of $9.10, which was made payable to the I.B.E.W. and Local

284 (R. 15), for the payment of his dues for the month of March, 1953. This money order was forwarded forthwith by mail, c/o Salvatore Messina, who was at the time the financial secretary of Local 284 and who under the constitution of the I.B.E.W. and Local 284 was the proper person to whom payment of dues was to be made.

The money order was received by Mr. Messina on June 2, 1953. On this same date Mr. Messina returned to the petitioner the said money order with letter advising the petitioner that he was three months in arrears and inasmuch as "your money order was postmarked one day after the deadline which was May 31, 1953 you now stand suspended from all benefits of this local union, . . ." (R. 3-4).

Massachusetts General Laws (Ter. Ed.) c. 4, sec. 9 provides as follows; "Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day."

The master found (and it was admitted by the respondents) that it was and had been the custom and practice of Local 284 to permit the members thereof to pay dues any time on or prior to the last day of the third month of the time within which the dues were first payable. It was further admitted by the respondents that, so far as Local 284 was concerned, if the petitioner had paid his dues on Sunday, May 31, 1953, his payment would have been accepted; that the petitioner would not have been suspended, and that he would have continued to be a member in good standing (R. 16).

The master found that this custom and practice had become the accepted practice of Local 284, was known of by

all the members thereof and was relied thereon by all the members thereof, including the petitioner.

The petitioner himself, as well as others, had at earlier times made use of the final day of the aforesaid three month grace period. On each and every one of such occasions the petitioner's dues had been accepted as paid within the time prescribed by the constitution and by-laws of Local 284 and the I.B.E.W. (R. 10, 20).

It was also the acknowledged and accepted custom of Local 284 to accept the post-marked date appearing on the money order, check or letter as the date upon which payment was made (R. 16). The petitioner had never been warned by either Local 284 or the I.B.E.W. that he had gone beyond the grace period for the payment of dues as required by the constitution of Local 284 and the I.B.E.W.

The master further found that the petitioner was totally unaware of the fact that he did not have a full three months grace period for the payment of his dues (R. 21); that there was no evidence that the I.B.E.W. was aware of the aforesaid custom and practice of allowing the members of Local 284 a three-month grace period for the payment of dues except as the records and reports forwarded to them showed this to be the practice; that the records received by the I.B.E.W. from Local 284 were sufficient to reveal the aforesaid custom and practice of Local 284.

The master found that there has been no amendment to the constitution or by-laws of the I.B.E.W. and Local 284 recognizing or granting members a three-month grace period; that there had been no known waiver by the I.B.E.W. of the requirements of the constitution with respect to the payment of dues by the petitioner; and that Local 284 had no permission to waive the requirements of the constitution (R. 22). The master further found that the petitioner was properly suspended for non-payment of dues; that he was not entitled to reinstatement; that as a

result of the suspension of the petitioner it was extremely difficult if not impossible for the petitioner to find employment in his chosen field (that of an electrician), due to the nature of the contract between the electrical employers of Berkshire County with Local 284 and the I.B.E.W. (R. 23).

The master found by way of alternate findings that, if the petitioner had a three-full-month grace period, the petitioner had, by mailing his dues on June 1, 1953, to the financial secretary, paid his dues on time and as a result was entitled to reinstatement and to recover damages.

Argument and Reasons for Allowance of Writ.

A.

The reasons relied upon by this petitioner for the allowance of the writ are as follows:

1. The action taken by the Supreme Judicial Court of the Commonwealth of Massachusetts ignored the fact that the petitioner was deprived of his property right, namely, the right to work and the equal protection under the law as guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States.

2. The Supreme Judicial Court for the Commonwealth of Massachusetts has, by its opinion, incorrectly applied the principle of law that the officer, agent or servant of a voluntary association, though acting in his official capacity, cannot waive the requirements of the constitution or by-laws of said voluntary association.

The basis for the petitioner's contention is that to permit officers, agents or servants of a national or international voluntary association of such huge proportions and of such tremendous economic powers as the I.B.E.W. and Local 284, through said officers, agents and servants acting in their official capacity, not to bind the association is to deprive a member thereof of equal protection under the

law, and in the petitioner's case resulted in the loss of his constitutional right to work, without due process of law.

The petitioner further contends that in such voluntary associations as the I.B.E.W. and Local 284 the member thereof must of necessity deal solely with the local officers and agents of the voluntary associations and must rely upon their representations.

3. The Supreme Judicial Court of the Commonwealth of Massachusetts has deprived the petitioner of his right to equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. The issue involved in this case is of major importance and should be resolved by this Court.

The basis for the petitioner's contention is that the decision in this case is of tremendous importance, not only to all members of Local 284 who have relied upon the aforesaid custom and practice, but to all those members of other Locals of the I.B.E.W. where this custom and practice may have prevailed. If the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts is to prevail, it entails the probable loss of the pension rights, security, right to work and other benefits from the I.B.E.W. if, during the course of his membership in the I.B.E.W. and the respective Locals, any member paid his dues during the last month of what was believed to be a three-month grace period.

The case presents the question of whether the Fifth and the Fourteenth Amendments to the Constitution of the United States were violated by depriving the petitioner of his right to work and equal protection under the law, without due process of law.

Adair v. *United States*, 208 U.S. 161, 173-175.
Coppage v. *Kansas*, 236 U.S. 1, 10.

B.

The Supreme Judicial Court of the Commonwealth of Massachusetts has failed by its decision to consider the constitutional questions involved in the case at bar with particular reference to those constitutional rights guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States.

1. It has failed to consider or recognize the fact that the petitioner has been deprived of his property rights, namely, the right to work and to earn a living in his chosen field (that of an electrician), without due process of law.

2. It has in effect denied the petitioner the equal protection under the law and has permitted the respondents to become a privileged group that can hide behind a cloak of technicalities.

3. It has failed to consider the fact that, though the respondent unions are voluntary associations, they have grown to such tremendous size and proportions in economic power, influence and responsibility that, by contending that they cannot be bound by acts of their officers, agents and servants, they have deprived the petitioner of his property rights and equal protection under the law.

C.

The Supreme Judicial Court of Massachusetts in directing a decree to be entered for the respondents erred in that it failed to take into consideration the question involved and the rights guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States.

1. The master found as a fact that the suspension of the petitioner from Local 284 and the I.B.E.W. "made it extremely difficult if not impossible for the petitioner to

obtain work as an electrician." (R. 23). It is fundamental that one's right to work in the field of his own choice is a property right closely guarded and protected by the Fifth and the Fourteenth Amendments to the Constitution of the United States:

Smith v. *Texas*, 233 U.S. 630.
Yee Gee v. *City and County of San Francisco* (D.C. Cal.), 235 F. 757.
State v. *Chapman*, 69 N.Y.L. 465, 55 A. 94.
Wood v. *Security &c. Co.*, 112 Neb. 66, 198 N.W. 573, 34 A.L.R. 712.
Dash v. *Jackson*, 170 Md. 326, 183 A. 534, 538.
Adair v. *United States*, 208 U.S. 161, 173-175.
Coppage v. *Kansas*, 236 U.S. 1, 10.
Cornellier v. *Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, 560.
State v. *Stewart*, 59 Vt. 273, 289.

It is true that the right to work is not an absolute one and is subject to some regulation; however, such regulation must be of reasonable character and be more in the form of a limitation and cannot under the Fifth and the Fourteenth Amendments to the Constitution of the United States cut off one's right to work absolutely, particularly where there is no major benefit to society as a whole. In the case at bar the petitioner has been deprived of his right to work as an electrician, though at all times he acted in good faith and in reliance upon the representations and customs and practices established by those officers of Local 284 and the I.B.E.W. Those same officers, agents and servants were the same officers with whom he had dealt throughout his membership in Local 284 and the I.B.E.W. Those officers were acting at all times in their official capacity. Clearly, to deprive the petitioner of his right to

work under such circumstances is a violation of the Fifth and the Fourteenth Amendments to the Constitution of the United States and clearly falls within the realm of what the framers of the Constitution intended to guard against.

The Court must recognize the material alteration in form, purpose, growth and responsibility of vast voluntary associations such as Labor Unions, and must not permit them to hide behind archaic acts of those officers, agents or servants where such acts are in violation or contravention of the constitution or by-laws of the voluntary associations, though the parties may have acted in good faith in reliance thereon and to the petitioner's damage.

If the Court permits this archaic principle of the common law to prevail, it can only result in hardship to society and to those very members of the association and organization it was designed to protect. In the case at bar the petitioner has been deprived of his right to work. However, this is not a matter to consider as an isolated case, for from the record it is clear that there were many members of Local 284 and possibly of other Local Unions of the I.B.E.W. who acted in the same manner as the petitioner, and who by decision of the Supreme Judicial Court of the Commonwealth of Massachusetts may be deprived of their fundamental right to work.

If the characterization of the Labor Union as a voluntary association becomes entirely anarchistic, the mere word "voluntary" should not preserve the present state of the law.

Carrol v. Local 268 of the International Brotherhood of Electrical Workers, 31 A. 2d [illegible] Ct. of Chancery of N.J.

It is fundamental that a change surrounding voluntary associations such as the economic strength of Labor Unions

may make existing laws an instrument of oppression, and when this is the case the rule violates the very purpose for which it was created. In the case at bar it violates those fundamental rights guaranteed by the Fifth and the Fourteenth Amendments to the Constitution of the United States.

2. The petitioner is entitled to equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dash v. Jackson, 170 Md. 326, 183 A. 534, 537.

The duty rests upon the Court to protect and enforce those constitutional provisions, intended to secure, the equality of rights which are the foundation of free government.

Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 46 L. Ed. 679.

Under the law both of the Commonwealth of Massachusetts and of the United States the petitioner is bound by those representations made by him.

The Massachusetts Supreme Judicial Court has held in the case at bar that Local 284 and the I.B.E.W. are not bound by the representations made by their officers, agents and servants acting in their official capacity, although these same officers, agents and servants are the sole parties representing Local 284 and the I.B.E.W., with whom the petitioner had to deal. Consequently, Local 284 and the I.B.E.W., as well as other Labor Unions which are voluntary associations, are privileged organizations and those who deal with them are denied equal protection under the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. It has been the law of the Commonwealth of Massachusetts for many years that voluntary associations are not bound by the actions, representations or conduct of their officers, agents and servants, although they act in their official capacity, where such actions, representations or conduct are in violation of some provision of their constitutions or by-laws. This rule of the common law dates back into the early history of the Commonwealth of Massachusetts and was principally designed to protect those small voluntary associations that existed at the time. However, the characteristics, scope and responsibilities of voluntary associations in the field of Labor Unions have been so vastly changed that to permit this principle of law to continue in many instances will deny those who are in such Unions their fundamental rights and privileges guaranteed by the Constitution of the United States and the amendments thereto.

The new characteristics of Labor Unions such as Local 284 and the I.B.E.W. must be considered in the light of the facts as they exist today. The Court must consider that in Labor Unions such as the I.B.E.W. there is no longer an opportunity for all members to gather in one place and discuss their various problems. The members of Labor Unions are represented by officers duly elected by them and it is to these officers to whom they look for guidance and on whom they must rely. If a member is not permitted to rely upon the representations of these duly elected officers and duly appointed agents and servants, then there is no one to whom he can come for guidance, or on whose word he can rely. It has become a one-way street, so to speak, where by the law, the member of a Labor Union is bound by his representations and actions but the Labor Union is not bound. Clearly, it cannot be said that this was intended when Labor Unions were created.

Stare decisis does not mean that the law becomes stagnant, for it has been the history of our country that, when a circumstance surrounding a principle has been materially altered, so is the law altered to guarantee justice and equality of the law to all. The responsibility of Labor Unions to our society and economy is equally as great as that of some of our largest corporations and many of our governmental bodies. Certainly, they cannot be permitted to now hide behind archaic technicalities of the law which were never intended or designed for such organizations. The petitioner contends that one of the basic and fundamental purposes of the Fifth and Fourteenth Amendments to the Constitution of the United States, is to guarantee life, liberty, property and equal protection under the law, and no one should be deprived thereof without due process of law.

The decision of this Court will undoubtedly have far-reaching effects, not only upon those members of Local 284, but upon all members of Labor Unions throughout the nation. There is no question in the case at bar that the petitioner acted at all times in good faith and in reliance upon the representations of the officers, agents and servants of Local 284 and the I.B.E.W., and in fact had on many cases previously paid his dues on the last day of what he believed was a three-month grace period for the payment of dues. Those dues were always accepted by Local 284 on behalf of itself and the I.B.E.W., the petitioner never having been advised by any officer of Local 284 or the I.B.E.W. that he had gone beyond the grace period as provided in the constitution of Local 284 or the I.B.E.W. None of the officers of Local 284 or the I.B.E.W. contended prior to the trial of this case that the petitioner was more than one day late in payment of his dues. Nevertheless, if the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts is to prevail, the petitioner will be

deprived both of equal protection under the law and of his right to work in his chosen field, that of an electrician, in violation of the guaranties contained in the Fifth and the Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

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FRANCIS L. McDERMOTT *vs.* JOSEPH J. JAMULA & others.

Berkshire. September 25, 1958. — December 9, 1958.

Present: WILKINS, C.J., SPALDING, WILLIAMS, COUNIHAN, & CUTTER, JJ.

Unincorporated Association. Labor and Labor Union. Custom. Waiver. Equity Pleading and Practice, Appeal.

Suit in equity in the Superior Court, in which the plaintiff appealed from an interlocutory decree by *Quirico*, J., confirming a master's report and from a final decree by *Thompson*, J., dismissing the bill.

CUTTER, J. This is a bill in equity by a licensed electrician against several defendants as representative of the entire membership of Local 284 of the International Brotherhood of Electrical Workers (hereinafter called Local 284) and of the brotherhood itself (hereinafter called I. B. E. W.) alleging unjust suspension from both Local 284 and I. B. E. W. and seeking (a) to be treated as if he had not been suspended, and (b) damages for the alleged wrongful suspension. A demurrer was overruled and the case was referred to a master whose report states the following relevant facts.

The plaintiff prior to March 1, 1953, had been a member in good standing of Local 284 and of I. B. E. W. He did not pay any of his monthly membership dues and assessments, amounting to $9.10 per month, for March, April, or May, 1953, until Monday, June 1, 1953, when early in the morning he purchased a money order for $9.10 payable to "I. B. E. W., Local 284," and mailed it to the financial secretary. The financial secretary received the money

order on June 2, 1953, and returned it to the plaintiff with a letter reading in part: "I am returning your money order of $9.10, postmarked June 1, 1953. Being three months in arrears, your money order was postmarked one day after the deadline which was May 31, 1953. This is to notify you that you now stand suspended from all benefits of this local union, and can only be reinstated by the local union, providing you comply with the laws and rules of the constitution in article 24, section 1–6 inclusive."

The pertinent provisions of the constitution (hereinafter sometimes called the constitution) of I. B. E. W. and of the by-laws of Local 284, as found by the master, are set out in the margin.[1] The plaintiff has not at any time applied for reinstatement in accordance with art. XXIV, § 1, but, on the present record, we can consider the case as if the plaintiff had pursued all other appropriate remedies within the union.[2]

It had "been the custom of Local 284 for at least three years prior to 1953 to permit members to pay dues at any time on or prior to the last day of the third month from the

[1] The constitution, art. XX, § 1, reads in part, "L. U.'s [local unions] shall *collect* dues from members either monthly or quarterly *in advance* . . ." Article XXIII, § 3, reads in part, "Any member *indebted* to his L. U. for *three months' dues*, or having any past due indebtedness to the I. B. E. W. for dues . . . shall stand suspended, and the L. U. may refuse to accept dues from any member who is indebted to it. Such member cannot be reinstated until all *indebtedness* has been paid, unless remitted by the L. U. However, dues cannot be remitted." Article XXIV, § 1, reads, "Anyone suspended for being *in arrears for three months*, but less than six months, may apply for reinstatement. . . ." Article XVII, § 8, provides that the constitution "shall be considered a part of all L. U. bylaws and shall be . . . binding on each . . . L. U. member." The by-laws of Local 284, art. XIII, § 13, make the constitution of I. B. E. W. "a part of these bylaws." Article X, § 4, of the by-laws reads, "Dues are *payable* monthly *in advance*. Members who fail to pay their dues in accordance with the requirements of this Section may be removed from the job . . . until such time as all dues are paid." The italics in these quotations have been supplied for purposes of convenient reference.

[2] The master found that the union waived any formal requirements of the appeal procedure provided and "passed upon the appeals of the" plaintiff, which may have been prosecuted somewhat informally. The master also found that a final appeal to the I. B. E. W.'s international convention would have been denied and that "[a]ssuming that the suspension was improper . . . the . . . [plaintiff] pursued his remedies within the union so as to entitle him to appeal to court for the relief . . . which he is here seeking." The defendants in their brief appear to make no contention that the plaintiff has not in fact pursued his remedies within the union. We think the allegations in the bill with respect to the plaintiff's prosecution of his remedies within the union are adequate to be good against demurrer.

time when the dues were first payable. . . . [I]f the . . . [plaintiff] had paid his dues . . . on Sunday, May 31, the dues payment would have been accepted and the . . . [plaintiff] would not have been suspended . . . . [W]ithin the local this custom had become accepted practice . . . known to and followed by local members. It was also the . . . custom . . . to accept the postmark date . . . as the date on which payment was made."

The plaintiff was not regarded as a good union man by the financial secretary and the business manager of Local 284, who were hostile to him. In sending, however, the letter returning the plaintiff's payment received by them on June 2, they were acting in accordance with the common practice of the local. The plaintiff had been sick for a year prior to his suspension. His record of dues payments had been poor and, for some time, he had been paying dues on the last, or nearly the last, day on which the union, by its custom, was willing to receive them.

The master also found that, in the course of the appeals taken by the plaintiff, there was correspondence between the plaintiff and I. B. E. W. This correspondence was attached to his report. On August 19, 1953, the I. B. E. W. president replied to a letter from the plaintiff "concerning the arrearage in your dues which occurred because of your failure to make payment *within the three months ending May 31, 1953*" (emphasis supplied), saying that "there is no constitutional authority . . . which can require dues receipts to be written after the three month period has expired." On December 24, 1953, the secretary of the I. B. E. W. executive council notified the plaintiff of the council's action on his appeal referring to the plaintiff's having gone "one day beyond the deadline in paying his dues."[1] The master, however, also expressly found (a) that

[1] The whole report of the action of the council reads as follows: "Francis L. McDermott went one day beyond the deadline in paying his dues to Local Union 284, Pittsfield, Massachusetts. May 30, 1953 (Decoration Day) was a holiday. The Post Office was closed. Next day (Sunday) it was closed. Next day (Monday, June 1) McDermott obtained a postal money order for his dues and mailed it to the Local's financial Secretary. The money order was returned to him. He was suspended and lost his continuous standing. Our Constitution reads: 'Any member indebted to his L. U. for three month's

no "evidence was introduced . . . whether . . . the International was aware of the practice in the local union of allowing an extra thirty days for payment of dues, except as it may have become aware" of the practice because of its correspondence with the plaintiff and from the records forwarded to I. B. E. W. by Local 384 which "were complete enough so that, if analyzed, they would have revealed the local union practice," and (b) "that there was no evidence that I. B. E. W. had actual knowledge of the custom of the local to accept the postmark date as the payment date . . . unless . . . the knowledge of the local union financial secretary may be imputed to . . . I. B. E. W."

The plaintiff's contention that the payment on June 1 of his dues for March was seasonable rested on the fact that May 31 was a Sunday and relied upon the operation of G. L. c. 4, § 9, which provides that when "the last day for the performance of any act, including the making of any payment . . . falls on Sunday . . . the act may . . . be performed on the next . . . business day." The master, however, construed the provisions of the union's constitution and local by-laws as making May 1, and not May 31, the last date on which a payment of the March dues would avoid a suspension. The master concluded that the plaintiff "was properly suspended . . . for nonpayment of dues and that . . . [he] is not entitled to reinstatement since he failed to comply with the requirements of the constitution and by-laws" in that respect.

As an alternative finding, in case he was wrong in his construction of the I. B. E. W. constitution, and Sunday, May 31, was in fact the last day for payment without suspension, the master found that the payment made by the plaintiff was "proper and on time," and "that the suspension . . . was improper." The master also found that "the suspension of the . . . [plaintiff] made it extremely difficult,

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dues . . . shall stand suspended, and the L. U. may refuse to accept dues from any member who is indebted to it.' (Art. XXIII, Sec. 3.) Such cases as this are most distasteful to the Executive Council. For we have no authority to extend even one day's grace. And, as the International President's decision points out, 'There is no constitutional authority granted which can require dues receipts to be written after the three month period has expired unless the member desires to reinstate.' The appeal must be denied."

if not impossible, for . . . [him] to obtain work as an electrician." The master's report purports to set forth on various bases the amount of damages to which the plaintiff would be entitled if he was entitled to damages at all.

The master's report was confirmed by interlocutory decree. A final decree was entered dismissing the bill. The plaintiff has appealed from each decree.

1. The defendants have filed a motion to dismiss the appeals because they contend that the order for preparation of the papers on the appeals was not given seasonably. The order was in fact given on May 19, 1958, in advance of the date (May 21, 1958) when the clerk notified the judge and the parties that the time for filing designations had expired, and, of course, well before the expiration of thirty days from such notice or any earlier approval of the record as designated. See Rule 2 (F), as amended, of the Rules for the Regulation of Practice before the Full Court (1952), 328 Mass. 694, 332 Mass. 791. See also *State Realty Co. of Boston, Inc.* v. *MacNeil Bros. Co.* 334 Mass. 294, 297. The order was seasonable and the fact that it was given before the date when it need be given does not render it invalid. See *Sherrer* v. *Sherrer*, 320 Mass. 351, 354. See also *Tanzilli* v. *Casassa*, 324 Mass. 113, 115. The motion to dismiss the appeal must be denied.

2. *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617, 621–623, establishes that this suit in equity may be maintained for restoration of the plaintiff's membership and for damages, notwithstanding the labor management relations act of 1947, as amended; 29 U. S. C. (1952) §§ 141–188. The basis of seeking relief in the present case is of the same character as in the *Gonzales* case (see pp. 621–622), viz. alleged "breach of a contract governing the relations between . . . [the plaintiff] and his unions." The principal question for our decision is whether the plaintiff tendered his March, 1953, dues seasonably under the constitution and by-laws.

3. As permitted by art. XX, § 1, of the constitution, art. X, § 4, of the by-laws of Local 284 provides that dues shall be payable to Local 284 monthly in advance (see footnote 1, *supra*). Article XXIII, § 3, of the constitution

provides for suspension of a member "indebted . . . for three months' dues." Article XXIV, § 1, however, refers to the rights to reinstatement possessed by anyone "suspended for being in arrears for three months."

The master interpreted these provisions in the aggregate as requiring that dues be paid "'in advance, that on failure to make . . . . payment in advance the . . . member would 'stand suspended' as soon as he was indebted for three months' dues," and that, because dues were payable in advance "on, for example, March 1, a member was indebted for one month's dues, on April 1 for two months' dues, and on May 1 for three months' dues."

If art. XXIII, § 3, stood alone, it would seem plain that the master was correct and that a debt would arise for dues payable in advance not later than midnight of the first day of the period for which the payment was made, and that at midnight on May 1, 1953, this plaintiff became indebted for three months' dues. See *Smith* v. *Shepard*, 15 Pick. 147, 150 (rent payable quarterly in advance payable at any time during first day of quarter); *Highland Trust Co.* v. *Slotnick*, 289 Mass. 119, 121 (rent.) See also *Rowe* v. *Williams*, 97 Mass. 163, 165.

The plaintiff argues, however, that a person would not be "in arrears for three months" under art. XXIV, § 1 (which refers to one who has been suspended under art. XXIII, § 3), until the expiration of three months after the first day of the dues period. If art. XXIII, § 3, must be read with, and controlled by, art. XXIV, § 1, there would be some force in the plaintiff's contention. Article XXIII, § 3, of course, is the rule which directly governs the matter of suspension, and under this provision the ground for suspension is being "*indebted* . . . . for three months' dues" (emphasis supplied).

The plaintiff in effect argues that the language of art. XXIV, § 1, should control the interpretation of art. XXIII, § 3, with the consequence that suspension of a union member cannot take place until he has been in arrears in paying an instalment of dues for three months. It is said that to construe the provisions otherwise would lead to an absurd

result in any union where dues are payable quarterly in advance. A union member required to pay dues quarterly in advance would become (see the rent cases already cited) "indebted" for three months' dues by midnight on the first day of the quarter. The plaintiff suggests that a strict application of art. XXIII, § 3, would mean that the member then would become automatically suspended, and points out that the framers of the constitution can hardly have intended such a result. See *Berkal* v. *M. DeMatteo Constr. Co.* 327 Mass. 329, 333; *Botnish* v. *Romanos*, —— Mass. ——, ——.[a] The construction of those provisions adopted by the master would seem, indeed, to have the strange consequence[b] mentioned by the plaintiff in local unions, if there are any, where dues are payable quarterly in advance.

The plaintiff also contends that, in construing the applicable provisions of the constitution of I. B. E. W., the practical construction put upon the supposedly ambiguous provisions by the union itself must be given weight. See *Cetrone* v. *Paul Livoli, Inc.* 337 Mass. ——, ——.[c]

Weighing, however, all the considerations mentioned by the plaintiff, we think that there is no such ambiguity in arts. XXIII, § 3, and XXIV, § 1, as will permit us to resort to the parties' custom as an aid to construction. The meaning of art. XXIII, § 3, seems to us plain and we view it as the controlling section rather than art. XXIV, § 1.

Even if resort were to be had to the defendants construction of these articles in actual practice, the existence of any such construction for any substantial time, so far as I. B. E. W. is concerned, is far from clear. We are here construing provisions of a constitution plainly meant to control the practices of all local unions and not merely the practices of Local 284. We think that uniformity of interpretation was intended and that the meaning of the provi-

[a] Mass. Adv. Sh. (1958) 1197, 1199.

[b] The defendants suggest that, even in a local which required dues to be paid quarterly in advance, a member would not be indebted for any particular month's dues until the first day of that month. This suggestion does not seem valid, for, under the rent cases already cited, an indebtedness for three months' dues would exist at the end of the first day of the quarter.

[c] Mass. Adv. Sh. (1958) 917, 919.

sions cannot be affected by a custom not proved to have extended beyond Local 284. We reach this conclusion despite the fact that the by-laws of Local 284 incorporated the provisions of I. B. E. W.'s constitution by reference (see footnote 1, *supra*). The correspondence already mentioned between I. B. E. W. and the plaintiff, which the master attached to his report, indicates that I. B. E. W. officers accepted the view of Local 284 that the plaintiff would not have been suspended if he had paid by letter dated May 31. This, however, falls short of showing that I. B. E. W. had theretofore regularly construed the constitution in practice in a manner consistent with the custom adopted by Local 284. On this record, the subsidiary facts shown or found by the master do not require a finding that the constitution has been construed consistently by I. B. E. W. in the manner in which it was interpreted by Local 284.

Little weight can be given to the fact that in local unions where dues are payable quarterly in advance, art. XXIII, § 3, if strictly applied, reaches a somewhat absurd result. It may well be that few, if any, local unions require quarterly dues payments in advance. If this is so, it may explain the failure to notice the absurdity until the ingenuity of the plaintiff's counsel brought it to light in the present case. Whatever may be the case, this absurdity cannot be permitted to affect the plain meaning of art. XXIII, § 3, as applied to dues payable monthly in advance.

4. On this record, it cannot be ruled that I. B. E. W. waived strict compliance with its constitution. Such power does not exist in the officers or even in the membership of an unincorporated association with respect to basic matters affecting the existence of the association. *McFadden* v. *Murphy*, 149 Mass. 341, 433. *Kane* v. *Shields*, 167 Mass. 392, 396. *Hill* v. *Rauhan Aarre*, 200 Mass. 438, 439. *Hamaty* v. *St. George Ladies Soc.* 280 Mass. 58, 67. *Bacon* v. *Paradise*, 318 Mass. 649, 654. This principle has been held to be controlling in matters involving the relations of membership corporations to their members. *Societa Unione Fratellanza Italiana* v. *Leyden*, 225 Mass. 540, 545–547. The

case last cited (at p. 547) distinguished *Crowley* v. *A. O. H. Widows' & Orphans' Fund*, 222 Mass. 228, on the ground, not clearly justified by the language of the *Crowley* case, that in the *Crowley* case there was evidence that the governing by-law had been abandoned. The *Leyden* decision also distinguishes cases of waiver of the provisions of mere contracts between associations and their members, not embodied in a constitution or by-laws. See e.g. *Rice* v. *New England Mut. Aid Soc.* 146 Mass. 248. Cf. *Kubilius* v. *Hawes Unitarian Congregational Church*, 322 Mass. 638, 644–645. On the facts of the present case the *Leyden* case is controlling and there was no power in the officers of Local 284 to waive the provisions of the constitution of I. B. E. W. and their failure to observe it does not give rise to an estoppel of the defendants to rely on these provisions.

Decrees affirmed.

W. Stanley Cooke, for the plaintiff.

Clement A. Ferris, (*L. George Reder* with him,) for the defendants.

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No. 752

FILED
APR 3 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

FRANCIS L. McDERMOTT, *Petitioner*,

v.

JOSEPH J. JAMELA, ET AL., AS REPRESENTATIVE OF THE ENTIRE MEMBERSHIP OF LOCAL 284 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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The petition for writ of certiorari filed by petitioner adequately refers to the opinion delivered in the court below; it also contains a satisfactory statement of the grounds on which the jurisdiction of this Court is involved. However, the petition does not contain a statement of the case which presents, as required by the Rules of this Court, all of the facts material to a consideration by this Court of its jurisdiction herein.

Rule 23(f) of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954 to the extent here pertinent, reads:

If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The petition fails in every respect to comply with any of these requirements of Rule 23(f) simply because no federal question, including the "question presented for review" as set forth in the instant petition, was raised in, or considered by, the courts below. Accordingly, this Court would not be *reviewing* the question presented by petitioner but, instead, would be initially deciding it without the Supreme Judicial Court of the Commonwealth of Massachusetts having had the opportunity to pass upon it.

The only questions upon which the Supreme Judicial Court of the Commonwealth of Massachusetts, the highest state court, ruled were set forth by petitioner's brief in that court, as follows:

1. Does article 23, sec. 3 . . . [of the Constitution of the International Brotherhood of Electrical Workers] require the suspension of a member for the non-payment of dues upon the member's becoming indebted for three months' dues.

2. Whether the I.B.E.W. and Local 284 are estopped from denying that the plaintiff had three full months for the payment of his dues for the month of March 1953, before being suspended under article 23, sec. 3 . . . , for non-payment of dues.

3. Whether the plaintiff was required to seek employment in fields outside of his trade in order to mitigate damages.

Not only was the "question presented" in the instant petition not raised in the highest court of the State, it was not raised at any stage of the proceedings in any State court below. Accordingly, since the record is utterly devoid of any reference to the federal question which petitioner is now requesting this Court to review, petitioner had no choice but to ignore the requirements of Rule 23 (f).

The plain fact is that the State courts were only requested to pass upon questions of local law concerning the construction and interpretation to be accorded the provisions of a constitution of an unincorporated association and the by-laws of a constituent member of such association. As the Supreme Judicial Court itself said, "The principal question for our decision is whether the plaintiff tendered his March, 1953, dues seasonably under the Constitution and by-laws" (Pet's Br. App. 1387).

ARGUMENT

Respondents assert that under the fundamental principles enunciated by this Court in its decisions concerning its jurisdiction to review the judgment of a state court, this Court is without jurisdiction to grant the review here sought by petitioner.

Petitioner seeks to invoke the review jurisdiction of this Court under 28 U.S.C. § 1257 (3) which provides, in pertinent part, that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by this Court by a writ of certiorari "where any title, right, privilege or immunity is *specially set up or claimed* under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States" (emphasis supplied). Jurisdiction under this section, however, cannot be invoked by peti-

tioner in view of the construction accorded the requirements of this section by this Court.

In order to give this Court jurisdiction, under 28 U.S.C. 1257(3), to review by a writ of certiorari, a decision of the highest court of a state against a title, right, privilege or immunity claimed under the Constitution of the United States, it must "appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way" *Spies* v. *Illinois*, 123 U.S. 131, 181. See, also, *Brown* v. *Mass.* 144 U.S. 573, 579; *Harding* v. *Illinois*, 196 U.S. 78, 85. In specifically construing the meaning of the words "specially set up or claimed", this Court stated in *Oxley Stave Company* v. *Butler*, 166 U.S. 648 at 654-5:

> . . . These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States . . . , he must so declare; and unless he does so declare 'specially', that is, unmistakably, this court is without authority to re-examine the final decision of the state court."

There is nothing in the record, respondents submit, that would indicate that petitioner "unmistakably" declared his intention to invoke the Constitution of the United States for the protection of his rights. Indeed, there is nothing in the record which would give rise even to a remote inference that the mind of the State court was directed to or considered the question now being presented to this Court. On the contrary, it is apparent from the record that such a contention was not raised in the State court.

In this connection, this Court has pointed out that there

"must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party. . . . A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. . . . A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it" *Dewey* v. *Des Moines*, 173 U.S. 193, 199-200. "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature" *Whitney* v. *California*, 274 U.S. 357, 362.

This Court has long regarded it as "well settled that this court, on error to a state court, can not consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered . . ." *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248. See, also, *Whitney v. California*, *supra*; *CIO* v. *McAdory*, 325 U.S. 472, 477; *Caperton* v. *Bowyer*, 14 Wall 216, 236; *Hulbert* v. *Chicago*, 202 U.S. 275, 280, 281; *Dorrance* v. *Pennsylvania*, 287 U.S. 660; *Chandler* v. *Manifold*, 290 U. S. 665; *Flournoy* v. *Wiener*, 321 U.S. 253; *Charleston Ass'n* v. *Alderson*, 324 U.S. 182, 185, and cases cited. And this "well settled" rule has been strictly applied by this Court. Thus, for example, it has been held that "a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon . . ." *Bowe* v. *Scott*, 233 U.S. 658, 663; a Federal question cannot be raised by a petition for certiorari where a failure to follow procedure designed by a State to raise such a question has resulted in a waiver (*Parker* v. *Illinois*, 333 U.S. 571); where a Federal constitutional issue was not raised in the trial court but was

raised for the first time in a petition for rehearing, the refusal, without opinion, of the highest court of the State to hear the case precludes review on certiorari by this Court (*Stembridge* v. *Georgia*, 343 U.S. 541, 547). See, also, *Hulbert* v. *Chicago*, 202 U.S. 275 holding that it is too late to raise a Federal question by a statement in a writ of error that constitutional rights and privileges were involved and decided by the highest court of the State against the plaintiff, even if the Chief Justice of that court allowed the writ, where, in fact, the claim that such rights and privileges were involved was never brought to the attention of the trial court or the highest court of the State. And, see, also, *Bailey* v. *Anderson*, 326 U.S. 203, 206-7 holding that if Federal questions were initially raised by assignment of errors in the highest state court and that court refuses to consider any issue not presented to the trial court, this Court is without jurisdiction.

On the basis of the foregoing, respondents submit that if this Court is without jurisdiction in cases in which there were abortive attempts to raise Federal questions in the State courts below, then, *a fortiori*, it is without jurisdiction in a case in which no such attempt whatsoever was made. It is obviously too late to raise the Federal question for the first time in the petition for certiorari filed with this Court since such petition is not part of the record of the State Court proceedings. See *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700; *Whitney* v. *California*, *supra*.

From the viewpoint of this Court's jurisdiction, there is no possible basis for distinguishing the instant case from those cited above in which this Court has declined jurisdiction. The fact that petitioner *now* asserts that his constitutional rights of "due process" and "equal protection of the laws" have been infringed does not render this case unique. See *Herndon* v. *Georgia*, 295 U.S. 441; *White River Lumber Co.* v. *Arkansas*, *supra*; *Bryant* v. *Zimmerman*, 278

U.S. 63. As this Court stated in *Bonner* v. *Gorman*, 213 U.S. 86 at 91-2:

> "It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States, *Central Land Company* v. *Laidley*, 159 U.S. 103, 112, and that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late. *Union Mutual Life Ins. Co.* v. *Kirchoff*, 169 U.S. 103, 110. And see *Sayward* v. *Denny*, 158 U.S. 180; *Mutual L. Ins. Co.* v. *McGrew*, 188 U.S. 291, 308. Moreover, 'according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed' *Arkansas Southern Railroad Company* v. *German National Bank*, 207 U.S. 270; *California Powder Works* v. *Davis*, 151 U.S. 389; *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 210 U.S. 281".

CONCLUSION

In this case, a decision upon a Federal question was neither necessary to the judgment of the State court nor in fact was made the ground of it. Indeed, no Federal question was timely raised or properly presented to the State court. Accordingly, it is well established by the prior decisions and long-continued practice of this Court that there is no occasion for the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts to be reviewed. We respectfully submit that the petition for certiorari should be denied.

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